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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY, REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, FOR THEMSELVES AND FOR AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
PETITIONERS,

V.

FIRST SECURITY BANK OF UTAH, N.A.,
DEFENDANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. If Congress substitutes a bank in the historic Constitutional role of the United States as a guardian and trustee of Indians and their property, may it be implied that the commercial trustee is shielded from trust liability to the Indian beneficiaries by any incidents of the "sovereign immunity" doctrine?

2. Whether protections created by an Act of Congress for "members" of a particular Indian tribe may be ignored by the trustee, or changed by administrative interpretations of the Bureau of Indian Affairs so that they apply to the "Tribe" and not to its "members," and be exempt from judicial review?

3. May protections under federal securities laws for securities holders in general and American Indians and their property in particular, confirmed by prior decisions of this Court, be made subject to or controlled by provisions of state corporate law?

4. Are Native Americans denied due process when claims that their trustee sold their assets for inadequate consideration are adjudicated without taking *any* evidence supporting the fact finder's conclusions as to value?

5. When a Court of Appeals denies that it "is bound to *follow* the Supreme Court's decision" (App.* A, pp. 10-11) (emphasis added) under either res judicata or collateral estoppel, in a related case involving the same parties and common issues, and rearticulates its own holding which had theretofore been rejected by this Court,[1] should this Court direct further proceedings consistent with its prior opinion?

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*The abbreviation "App." refers to the separately bound Appendix to this Petition.

[1]In Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972)

PARTIES TO THE PROCEEDINGS BELOW

The parties in the proceedings below are listed in the caption, other than that Anita Reyos, the lead plaintiff in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) was added as a party at the request of the respondent Bank and that the Petitioners are the class representatives of all so-called "mixed-blood" Ute Indians, as defined by the Ute Termination Act of 1954.

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this Court held that the Respondent "engaged in more than ministerial functions," and "[t]heir acts were clearly within the Reach of Rule 10b-5," rejecting the contrary holding of the Court of Appeals expressed in the same terms. The court below held that the same Respondent "was simply not engaged in *anything more than ministerial functions*" (App. A, p. 18) (emphasis added) and had no duty under Rule 10b-5.

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OPINIONS BELOW

The opinion of the Court of Appeals, appearing at App. A, is unreported. The opinion and findings of the District Court on the merits, appearing at App. C, is reported at 521 F. Supp. 541. A separate opinion of the District Court denying rehearing, appearing at App. D, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 31, 1983. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on March 21, 1983, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), time for filing of which expires June 19, 1983. *See* 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1 Stat. 51 (1789) (reenacting Art. III of the Northwest Ordinance of 1787):

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, . . .

The Ute Termination Act ("Termination Act") is published at 25 U.S.C. §§ 677-677aa and is reproduced in its entirety at App. E. Pertinent provisions concerning establishment of corporations and trusts are at Section 13 (25 U.S.C. § 677*l*):

> The plan for division of the assets among the members of the mixed-blood group may include:
>
> • • •

> (3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. . . .
>
> (4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. . . .

Section 15 (25 U.S.C. §677n):

> . . . In the event a *member* of the mixed-blood group determines to dispose of his interests in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the *members* of the tribe . . . . (Emphasis added.)

and Section 22 (25 U.S.C. §677u):

> . . . the Secretary [of Interior] shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate . . . .

The Plans for Division and Distribution, held by this Court to be action taken "pursuant to the Partition Act [and] contemplated by the Act," (406 U.S. 128, 143-44) have the dignity of regulations and provide in pertinent part:

> Shares of stock distributed to members who have no present use for the same may be leased or sold at the will of the holder thereof subject to the articles of incorporation[2] and by-laws of the corporation and in accordance with law. (Exhibit 20.)

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[2]The Articles of Incorporation are Exhibits 76 and 77 and for both corporations provide:

> If any stockholder who is a member of the mixed-blood group of said Ute Indian Tribe determines to sell or dispose of his stock in this

The relevant provisions of the Securities Exchange Act of 1934 ("Exchange Act") are reproduced at App. F and include Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 adopted thereunder (17 C.F.R. 240.10b-5).

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corporation at any time prior to August 27, 1964, he shall first offer it to the *members of the tribe, including the mixed-blood and full blood members thereof,* and no sale of any of said stock prior to said date shall be valid unless and until such offer is made to said *members of the tribe* in such form as may be approved by the Secretary of Interior. (Emphasis added.)

Petitioners, Randolph C. Hackford, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this proceeding rendered on January 31, 1983.

STATEMENT OF THE CASE

The issues framed by the opinion of the Court of Appeals are simple, being confined to three purely legal conclusions with respect to (1) the interrelationship of the trust and Indian laws of the United States, (2) the interface of federal securities laws with state corporate law, and (3) the application of res judicata and collateral estoppel. The facts, though complex, are also favorable for the consideration of this Court, being essentially stipulated.

Petitioners are so-called "mixed-blood"[3] Ute Indians of the Uintah and Ouray Reservation, Utah, who were "terminated"[4] from federal supervision by one of a series of acts of Congress adopted in 1954. The mixed-bloods thus terminated brought suit against the fiduciary established for them by the Secretary of the Interior, alleging breach of trust and breach of the anti-fraud provisions of the securi-

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[3]The term "mixed-blood" is mandated by Section 2 of the Termination Act. (App. E. at p. 137.) This Court observed in Affiliated Ute Citizens v. United States, 406 U.S. 128, 133 (1972) that "[i]nasmuch as the statute specifically employs the terms 'full-blood' and 'mixed-blood,' we feel compelled, for purposes of consistency and clarity, to do the same. No slur or offense whatsoever is intended."

[4]In 1954, Congress embarked upon another of the all-too-frequent shifts in policy which have characterized the history of Indian affairs. Known as "termination," the new policy included the transfer of Indian property to ordinary business corporations formed under state law, substitution of commercial banks for the United States in certain of the Government's trust duties, and the ending of the "special relationship" between the sovereign and its Indian wards rooted in Constitutional principles dating from the Northwest Ordinance of 1787. *See* U.S.C.A. Const., Ordinance of 1787, art. III, reenacted by Act of Aug. 7, 1789, 1 Stat. 51 (1789), and the U. S. CONST., art. I, § 8 cl. 3. The theory was that the so-called "Indian problem" could be ended by legislating changes in the Native American's economy and socio-legal status. The policy proved the most unpopular among the Indians, perhaps, of any ever imposed on them.

ties laws of the United States in connection with the sale of their capital stock in two range corporations. The range corporations in the matter at bar were simultaneously formed with and were similar to the holding corporation for mineral rights which was the subject of *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) (*"Affiliated Ute"* herein). In most other respects, the facts herein are materially the same as in *Affiliated Ute.*

The pertinent provisions of the Termination Act were reviewed by this Court in *Affiliated Ute.* (406 U.S. 128, 135.)

The Respondent, First Security Bank of Utah, National Association (the "Bank") was selected by the Bureau of Indian Affairs ("BIA") for the protective purposes specified in Sections 13 and 22 of the Termination Act, *supra.* The chief executive officers of the Bank solicited the Secretary of Interior for those responsibilities over a period of several years (406 U.S. 128, 152) and the Bank was finally designated trustee as to all Indian minors and transfer agent for the corporations under arrangements this Court found in *Affiliated Ute* gave rise to fiduciary duties to all mixed-bloods. (406 U.S. 128, 154.)

The agreed facts were that the Bank sold the stock of the trust beneficiaries, *before the stock was issued*[5] and in disregard of higher offers from mixed-blood "members of

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[5]The Minutes of the Trust Committee of the Bank were stipulated. They recite that on September 13, 1960, a "meeting [was] called at the request of [the tribal attorney], in order that he might present to the Committee a proposal of the Ute Tribe to purchase as a block the shares of stock" of the two corporations. (Exhibit 158.) Nine days later, on September 22, 1960, the Trust Committee resolved to sell the shares of 147 of the 174 Indians subject to the trust, for the price of $1,100 per unit (*i.e.,* one share in each corporation). (Exhibit 166.) No negotiations over the price are reflected in the minutes and the price was as proposed by the purchaser, exactly. The stock certificates were not issued until October 20, 1960, and on the date of the resolution to sell, the corporations had not commenced doing business. *See* App. C, p. 36.

the tribe."[6] The sale was in disregard of the mixed-bloods' first refusal option (referred to by BIA, and herein, as a "private treaty" right) imposed by Congress in the Termination Act and contained in the plans. (*See* 25 U.S.C. § 677n, *supra.*, and at App. E, p. 149 and note 2, *supra.*)

Petitioners alleged that the parents of the trust beneficiaries were then forced to sell their own shares, or be left in the untenable position of being minority shareholders in a corporation controlled by the Tribe, whose interests under the Termination Act were necessarily divergent from their own. The Bank's participation in causing that effect was an alleged breach of trust as to all mixed-bloods.

The major focus in the court below was on the question of the value of some 172,000 acres of land, which was the sole asset of the two corporations. It is uncontroverted that the Bank sold the capital stock *without obtaining an independent appraisal of the land*[7] and the trial court so determined. (*See* App. C p. 88.) The court below nevertheless

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[6]The trial judge concluded that "one Margaret Sprouse, a mixed-blood," accepted the offer of the Bank to sell the shares of the trust beneficiaries (App. C, p. 47) and that she "was willing to pay as much as $1500 a unit, and had resources available to accomplish the purchase of a controlling interest in the corporations." (App. C, p. 93.) The stipulated evidence also established that, in addition to Mrs. Sprouse, Joseph Arthur Workman, a Director of Affiliated Ute Citizens ("AUC"), obtained financing in the amount of $500,000 for the purchase of shares (see AUC. Minutes, Exhibit 75, for Jan. 25 and Jun. 22, 1960; Exhibits 347, 379, 380 and 381); Calvin Hackford, a Director of one of the range corporations, obtained financing in the amount of $400,000 to purchase shares at amounts in excess of $1,100 per unit (Exhibit 75, *supra.*, Minutes for Jul. 12 ,1960); and other Indians testified at the time of trial that they were willing to pay as much or more for the shares but were not allowed to do so.

[7]The Trust Committee Minutes contain no reference to a request for an appraisal and the trust officer who testified at the trial indicated he had "no personal knowledge" of an appraisal. (Transcript of Proceedings, p. 855.) An affidavit of the Bank's former trust officer recites that "the price [was] 10% above the value at which the lands were appraised *in making a division of Tribal assets . . . .*" (Exhibit 163.) (Emphasis added.)

presumed that Petitioners were paid a fair price for the individual Indian's pro-rata share of the range, by reference to a disputed appraisal in the record conducted by the BIA several years prior to the sale. The BIA appraisal was never offered in evidence to establish value,[8] however, and was determined in Affiliated Ute not to be a fair market value appraisal for the purpose of sale.[9]

The court below ignored uncontroverted expert evidence, stipulated as to qualifications, on the value[10] of the land, and held that reliance on the out-dated appraisal was in "good faith." (*See* App. A, p. 21; App. C, p. 87 and App. D, pp. 131-32). In fact there was no evidence that the Bank ever saw the disputed appraisal[11] or communicated its contents to the trust beneficiaries. Moreover, the legislative history of the Termination Act indicates that Congress was

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[8]The so-called "Moore appraisal," as the BIA appraisal was known, was in evidence as part of the background of facts concerning the implementation of the land division under the Termination Act. No witness at trial testified that it reflected a fair value as of the date of sale or for that purpose.

[9]The findings of the trial judge in *Affiliated Ute* included the following, appearing at pages 503-04 of the Appendix on file with this Court:

> 6. In 1958 the Bureau of Indian Affairs, acting in cooperation with the Ute Indian Tribe, did undertake the appraisal of the assets represented by the capital stock of the two related corporations, Rock Creek Cattle Range Company and the Antelope Sheep Range Company. . . .
>
> The primary purpose of the appraisals on the two land corporations was to carry out the division of assets found in Public Law 671. *These surface appraisals were later used by the Tribe in determining what they would pay for the range stocks.* The appraisals *were not made for the purpose of fixing the value of the stock at the time of its sale to the Tribe.* (Emphasis added.)

[10]Richard Palmer, an appraiser who testified as an expert pursuant to a stipulation by the Bank as to his qualifications, testified that the 172,000 acres of land had a value of $2,456,000 on the date of sale, without regard for minerals, water, timber or hunting and fishing rights. (Transcript of Proceedings, p. 1004.) That value represents $4,400.20 for each unit, compared with the $1,100 for which they were sold. *Palmer's testimony was not controverted by any evidence.*

told six years earlier that the land had a significantly greater value.[12]

The trial court determined the facts consistently with Petitioners' allegations, but nevertheless dismissed Petitioners' claims. The Court of Appeals for the Tenth Circuit affirmed on the three legal bases cited above.

As regards Petitioners' securities law claims, the Court of Appeals held that the "range corporation stock was not a 'security.'" "Had the corporations been designed to profit the shareholders, either through distribution of earned income or by the enhancement of stock value, they could not have been organized under the Utah Nonprofit and Cooperative Association Act," (App. A, p. 15) the Court of Appeals reasoned. The Bank's sale of the stock did not involve "anything more than ministerial functions,"[13] and this Court's contrary conclusion need not be "followed." (App. A, pp. 10-11. *See also* App. C, p. 82.)

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[11]The assistant trust officer who handled the mixed-blood account testified that "I do not recall ever having seen a [sic] appraisal report concerning the real property which [the two corporations] owned." (Transcript of Proceedings, pp. 734-5.) The Tribal attorney answered "no" when asked by counsel for the Bank if the $1,000 per share figure he quoted to the Trust Committee was "based on the Moore appraisal." "The full-bloods . . . requested the Phoenix office to appraise" for them, the tribal attorney explained. (Transcript of Proceedings, pp. 1160-61.) The trust officer who testified at trial was only to "assume [that the Moore Appraisal] was with our files at that point in time." (Transcript of Proceedings, p. 890.)

[12]*See* S. Rep. No. 1632, 83d Cong., 2d Sess. at p. 6: "This proposed legislation involves division of . . . . land, estimated on the basis of 980,000 acres at $5 per acre, excluding subsurface rights which were not to be divided . . . $4,900,000." $1,100 per unit for the shares amounts to $539,000 for all of the stock issued which, divided by 172,000 acres, equals *$3.13 per acre.*" (Emphasis added.) Even the Bank and its witnesses agreed that land values *increased significantly* during that period of time.

[13]*Compare,* this Court's holding that the Bank "engaged in more than ministerial functions . . . And they were acts performed when they were obligated to act on behalf of the mixed-blood sellers." Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

As regards Petitioners' claims of breach of trust, the Court of Appeals held that "[t]he Bank's *interpolation* of the range land value from nearby property values and the expert testimony *was reasonable under the circumstances.*" (App. A, p. 21.) (Emphasis added.) That holding paraphrased the trial court's conclusion that the trustee's duties must be measured against the standards applied to the sovereign in related circumstances, and that the legal test is "good faith."[14]

Important issues not addressed by the Court of Appeals were (1) Petitioners' objections that neither the BIA appraisal, nor any other opinion evidence supporting the conclusions of value, was offered or received in evidence; (2) the contention that disregard of the private treaty right vested in Petitioners by the Termination Act, the Plan and Articles of Incorporation amounted to a rewriting of the Termination Act by BIA and (3) that the Bank's acquiescence in the disregard of the private treaty violated the trust duty to act on behalf of the mixed-blood shareholders (406 U.S. 128, 152) and to conserve the trust assets.

REASONS FOR GRANTING THE WRIT

This case presents important questions of national policy touching the lives of the entire Native American population of this country — questions rendered more acute by the calculated disregard of this Court's pronouncements on the application of the commercial law of trusts and securities to rights of Indians in the process of "termination." Any change in the protected status of the Native population,

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[14]In a separate opinion reproduced at App. D, the trial court cited United States v. Sioux Nation, 448 U.S. 371 (1980) and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) holding that, because of sovereign immunity, the United States may abrogate its treaty obligations to Indians and held that they applied to the duies of the Bank herein.

whether Indian, Polynesian or Eskimo, will be impacted by this Court's work in these cases.

"Termination" (*i.e.*, ending the traditional and Constitutionally mandated special relationship between Native Americans and the United States, by legislating changes in their culture and economy, *see* note 4) remains a tragedy for the many thousands of American Indians already subjected to it. The spectre of its renewal is a recurring fear of those who have not yet fallen victims to the policy.[15] The decision herein magnifies their tragedy and validates their fears, by altering the entire fabric of Indian law and rejecting the customary requirement of straight dealing[16] with respect to Indians and their property. Terminated Indians are relegated to a second class status, to the extent that they are not accorded rights under federal securities laws or as a trust beneficiary equivalent to those applied for non-Indians.

Unless reversed, the decision of the Court of Appeals will result in the work of this Court in defining and safeguarding the rights of terminated Indians being ignored, at best, and perhaps destroyed altogether.

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[15]In 1933, Indian leaders from Wisconsin, Minnesota, Arizona and California, the Pueblo Council of 19 New Mexico reservations and the National Tribal Chairman's Association representing 154 member tribes, called for the "ouster" of Secretary of Interior Watt, Washington Post, Jan. 20, 1983, at A2, col. 1, after he said that reservations "fail to integrate [the Indians] into American social life.' Washington Post, Jan. 19, 1983, at A7, col. 1. In 1982, Indian groups throughout the nation were alarmed over a letter of Congressman James V. Hansen to Secretary Watt concerning a bill "which proposes termination, all supervision of Indians and tribes." S. L. Tribune, April 10, 1982, at A10, col. 1. Other examples occur yearly..

[16]*E.g.* Bacher v. Patencio, 232 F. Supp. 939, 941 (S.D. Cal. 1964) *affirmed, per curiam* 368 F.2d 1010 (9th Cir. 1966): "as Justice Holmes once said, people must turn square corners when they deal with their government. They must do the same when dealing with their government's wards."

I

THE DECLARATION OF THE COURT BELOW THAT IT WILL NOT "FOLLOW" A DECISION OF THIS COURT SHOULD BE REVERSED

The declaration of the Court of Appeals that it would not "*follow* the Supreme Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128" (App. A, pp. 10-11) (emphasis added) threatens the integrity of the Common Law system. The court below declared that it would not do so, even though the same Indians, the same Bank, the same trust and fiduciary arrangements, the same legal issues, concerning companion corporations, simultaneously formed, by the same act of the same Indians, pursuant to the same clause of the same plans, adopted under the same Termination Act, for common purposes, with the same shareholders, whose stock was held under the same transfer agent arrangements, were being considered by the same judge of the same Court of Appeals. The declaration was a casual one, in an opinion marked "not for routine publication," which has the appearance of a frivolous treatment of rights this Court has found substantial.

A. *The Court Below Disregarded* Affiliated Ute, *and Intended to do so.*

The opinion below disregards two fundamental holdings of *Affiliated Ute*.

1. The holding of *Affiliated Ute*, with respect to trust, was that the Bank's acts "were acts performed when they were obligated to act on behalf of the mixed-blood sellers." (406 U.S. 128, 154.) This Court affirmed the trial court's finding of a fiduciary relationship[17] on the same facts in-

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[17]In addition to the conclusions of this Court quoted above the findings, of the trial judge in *Affiliated Ute* include the following, appearing at pp. 521 and 536 of the Appendix on file herein:

30. By reason of the said Agreement of December 31, 1958, the said

volved herein because "the bank itself had acknowledged, by letter to AUC in January 1958, that 'it would be our duty to see that these transfers were properly made.' " With respect to the sale of shares, this Court concluded further, " 'the bank [agreed that it] would be acting for the individual stockholders.' " (406 U.S. 128, 152.)

With the same documents before it, and with complete awareness of this Court's holding, the Court of Appeals nevertheless declared that "the Bank had *no fiduciary duty* to the mixed-blood adults." (App. A, p. 19.) (Emphasis added.) The only justification offered for denying a fiduciary relationship, on the same facts which led this Court to hold that one was present, was that different assets were being administered.

2. In the process of finding a fiduciary relationship in *Affiliated Ute*, this Court also reversed the Court of Appeals' finding of "no duty [under Rule 10b-5] on the part of this defendant to any of the plaintiffs as his acts were purely ministerial in character." (431 F. 2d 1337, 1346.) This Court pointedly declared that when the Bank facilitated the sale of Ute Distribution Corporation stock it was "engaged in more than ministerial functions" and its "acts

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Affiliated Ute Indian Trust Agreement of July 26, 1960, the said Boyden letter of July 22, 1959, and the implementation of the said agreements and instructions . . . said Bank an its agents . . . came into possession of personal and confidential information and financial records of mixed-bloods. . . .

31. . . . First Security Bank and its agents . . . were at all times pertinent to plaintiffs' claims fiduciaries in the sense that they occupied a position of trust and confidence with reference to . . . each of the mixed-blood stockholders of Ute Distribution Corporation.

* * *

15. The Bank occupied toward the mixed-blood Indians not coming within the express provisions of the trust if not the position of a fiduciary in the strict sense at least a duty to deal with and for the mixed-bloods in good faith and lawfully without purpose of overreaching or imposition.

were clearly within the reach of Rule 10b-5." (406 U.S. 128, 154.)

With that holding by this Court before it, the Court of Appeals nevertheless held that the Bank "was not engaged in *anything more than ministerial functions*" (App. A, p. 18) (emphasis added) when it facilitated, and what is more, actually conducted the sale of stock in these range corporations.

* * * *

The contradictions on both points seem careless, if not openly defiant of this Court's opinion. To declare, in any circumstances, that it will not "follow" a binding decision issued by this Court — one issued "because of the importance . . . for Indians whose federal supervision is in the course of termination" (406 U.S. 128, 141) — seems doubtful policy, indeed, for the Court below.

Granted we can distinguish the sheep and cows of these range corporations from the oil derricks of the Ute Distribution Corporation, and we can agree that the corporations managing them have different purposes. Is that distinction of any force, however, when the question is whether the Bank was a fiduciary or had a duty under Rule 10b-5? Justice Blackmun looked to the representations the Bank made to these Indians for the answer to those questions, not to the nature of the Ute Distribution Corporation. Preoccupation with the nature and/or assets of the companies whose stock was held by the trust, to the exclusion of an examination of the instruments giving rise to the fiduciary relationship and the federal policy under the securities laws, led the Court of Appeals to wholly disregard the plain holding of *Affiliated Ute*.

What is presented is not a case of careful distinction of a prior opinion on its facts.

The same judge writing for the Court of Appeals herein authored the opinion this Court reversed in *Affiliated Ute*. His rationale herein is a mere rearticulation of the precise terms this Court rejected in *Affiliated Ute*. His disregard of this Court's prior opinion was calculated, for it was prefaced with the *quare* at App. A, p. 10, "[a]t the outset, we consider the plaintiffs' contention that this court is *bound . . . to follow*" *Affiliated Ute*. (Emphasis added.)

B. *Res Judicata and Collateral Estoppel Apply in This Case.*

The declaration of the Court of Appeals that "[b]oth doctrines [of collateral estoppel and res judicata] require an identity of factual issues in the two cases" is plain error. It ignores, moreover, recent pronouncements of this Court.

1. With respect to res judicata, this Court has recently reaffirmed that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating *issues that were or could have been raised in that action.*" (Emphasis added.) *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). The rule thus applies to *issues*, between the parties or their privies, and not merely to *facts*. The "facts" surrounding the water claims of the Indian intervenors in *Arizona v. California*, ... U.S. ....., 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983) had plainly not been litigated, but this Court nevertheless applied *res judicata* and declared that "[f]inality principles would become meaningless if an adversarially-determined *issue* were final only if the equities were against revising it." *Id* at 4331. (Emphasis added.) The "issue" was final, moreover, even though the Indians intervened in the *same action* pursuant to a *retention of continuing jurisdiction*.

The *issues* of "trust" and "duty" were clearly litigated in *Affiliated Ute*. Just as clearly litigated was the *issue* of whether the BIA appraisal was evidence of fair market value. Respondent Bank was a party to *Affiliated Ute*, as was Petitioner Anita Reyos.

This Court said in *Moitie* that "'[s]imple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied," for:

> The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case . . . . It is a rule of fundamental and substantial justice, "of public policy and private peace," which should be cordially regarded and enforced by the courts . . . .

Op. cit. supra at 401, quoting from *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

2. Even in cases not involving the same parties or privies, collateral estoppel bars relitigation of the same *issues*. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979). The conditions of *Parklane* are fully satisfied herein. Here, as in *Parklane*, "the contemporary law of collateral estoppel thus leads inescapably to the conclusion that [the Bank is] collaterally estopped." *Id.* at 332-33.

• • • •

The Court of Appeals nevertheless declared that "the plaintiffs' claim that we are bound by collateral estoppel and res judicata [is] unpersuasive." (App. A, p. 11.) The reason advanced, *viz.*, that there was different stock, of corporations with different purposes, and different acts, simply fails to address the *issues* previously litigated. Those differences necessarily are present when the prior decision is applied to other "Indians . . . in the course of termina-

tion," or to the myriad other cases involving non-Indians having no remote connection to the facts herein, which have properly "followed" *Affiliated Ute.*

C. *The Intent of the Prior Mandate is Plain and Should Be Enforced.*

Since the days of Chief Justice Taney, and before, it has been held that "when the direction contained in the mandate is precise and unambiguous, it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for authority to change its meaning." *West v. Brashear,* 39 U.S. 51, 54 (1840). The situation herein is similar to *Tyler v. Magwire,* 17 Wall. [84 U.S.] 253, 282 (1872), where the lower court was reversed a second time because it "entered a new decree . . . which in effect evades the directions given by this court, and practically reverses the judgment and decree which the mandate directed them to execute." Appropos such holdings, Justice Rehnquist recently declared that the "language used by this Court half a century ago is even more compelling in view of today's crowded dockets." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981).

In modern times, this Court has prevented calculated efforts to evade its mandate by ordering the Judicial Council to "assign a different District Judge to hear the case." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129, 142-43 (1967). The Court of Appeals' decision is based on no issues other than the "trust" and "duty" questions, both of which were decided in *Affiliated Ute.* This Court should reverse, or at least remand with directions to "follow" *Affiliated Ute.*

II

REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS WITH THIS COURT AND AMONG THE COURTS OF APPEALS ON THE APPLICATION OF PROVISIONS OF STATE CORPORATE LAW TO THE FEDERAL SECURITIES LAWS

The opinion of the Court of Appeals presents conflicts with decisions of this Court, and with other Courts of Appeals, on the application of the federal securities laws *vis-a-vis* provisions of state corporate law. That is so because the sole justification offered by the court below for the conclusion that the capital stock given to Petitioners, in exchange for their equity in 172,000 acres of land, was not a "security," was the claim that provisions of state corporate law prohibited "enhancement of stock value." (App. A, p. 15.) In point of fact, Utah law says no such thing,[18] but what is important to this Petition is the issue of supremacy of federal law.

A. *The Decision Below Conflicts with Decisions of this Court on the Supremacy of Federal Law.*

To the extent that it allows provisions of state law to control the effect of the federal securities laws, the decision below ignores the time-honored and recently reaffirmed policy of this Court. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946) held that form may not exalted over substance. Precise to the issue, this Court declared in *Tcherepnin v. Knight*, 389 U.S. 332, 337 (1967), that "[w]hile Illinois law gives legal form to the withdrawable capital shares held by the petitioners, *federal law must govern* whether shares

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[18]Utah Code Ann. § 16-6-21 provides that the *corporation may not be* formed for pecuniary profit. It does not say that there may not be an "enhancement of stock value."

having such legal form constitute securities under the Securities Exchange Act," (emphasis added) citing *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959). This Court's threshold decision in *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943) held that "it is not inappropriate that . . . offerings be judged as being what they were represented to be."

The Court of Appeals did not inquire into whether the shares could produce a profit, whether the shares were imposed upon these Indians with the promise that they would do so, whether the shares appreciated in value or whether the mixed-bloods were promised there would be a market for the trading of the shares. Lacking, also, was any inquiry into the availability of effective alternate systems for the protection of investors, which this Court has consistently required in those limited situations where exemptions have been implied. *See Marine Bank v. Weaver*, 455 U.S. 551 (1982). *Accord, SEC v. National Securities, Inc.*, 393 U.S. 453 (1969); *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202 (1967); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959).

This Court has recently reaffirmed its frequently repeated dictum "that securities laws combating fraud should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & McLean v. Huddleston*, ... U.S. ....., 51 U.S.L.W. 4099, 4102 (U.S., Jan. 24, 1983) quoting from *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

The record is clear and uncontroverted that, had the Court below undertaken *any* of the multiple inquiries required, these shares had *each* of the attributes this Court has held impart "security" status to an instrument or arrangement. The record is equally clear and uncontroverted that shares in these corporations were distributed in the

process of *removing* the protections previously afforded by BIA under the Indian laws.

B. *The Decision Conflicts with Decisions of the Courts of Appeals for the Second, Sixth, Seventh, and Ninth Circuits on the Effect of State Law.*

Other courts of appeals have uniformly given effect to this Court's declaration of federal supremacy in *Tcherepnin*. They have uniformly rejected the notion of reverse or state supremacy applied herein.

The Court of Appeals for the Ninth Circuit declared that "Federal law governs . . . . the question of when a sale is complete for purposes of section 16(b) [and] must be decided so as to foster the goals of the federal legislation rather than under concepts of when title passes under state law." *Provident Securities Co. v. Foremost McKesson, Inc.*, 506 F. 2d 601, 606 (9th Cir. 1974), *cert. denied*, 423 U.S. 1077 (1976). The Court of Appeals for the Sixth Circuit declared that "[t]he definition of ["purchase" and "sale" under the Exchange Act] is a matter of federal law . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties." *Champion Home Builders Co. v. Jeffress*, 490 F. 2d 611, 615 (6th Cir. 1974), *cert. denied*, 416 U.S. 986 (1974). The Court of Appeals for the Second Circuit held that "[t]he SEC is right in saying we should decide the issue [of the meaning of the term "purchase"] as one of federal law, even though a Delaware court construing its corporation laws might come to a different conclusion." *SEC v. Sterling Precision Corp*, 393 F. 2d 214, 217 (2d Cir. 1968). To the same effect *see Bershad v. McDonough*, 428 F. 2d 693, 696 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

The decision of the court below is at odds with the foregoing decisions. That conflict is complete, for the Court of

Appeals made no inquiry other than its reference to the state law.

C. *The Court Below Misapplied this Court's* Foreman *Decision.*

Though the Court of Appeals effected comfort from *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975), it is clear that it failed to apply the holding of that case. *Forman* did not hold that provisions of state law could be relied upon to exempt any arrangement from the scope of federal regulation. To the contrary, *Forman* reaffirmed the "basic principle that has guided all of the Court's decisions in this area: '[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality.' *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967). *See also, Howey, supra,* 328 U.S., at 298." (421 U.S. 837, 848).

This Court gave little weight, if any at all, to the formation of the housing cooperative involved in *Forman* under the nonprofit provisions of state law. Memberships in the cooperative were held not to be a "security" only because a detailed analysis of the terms of the offering led to the conclusion that they did not possess the attributes normally associated with stock. In doing so, this Court was emphatic that there must be an inquiry into the elements of the federal definition:

> . . . do they [possess] the other charactertistics traditionally associated with stock: they are not negotiable; they cannot be pledged or hypothecated; they confer no voting rights in proportion to the number of shares owned; and they cannot appreciate in value. (421 U.S. 837, 851.)

Neither the trial court nor the Court of Appeals conducted such an inquiry herein. It could not be concluded, in the

words of *Forman*, that these Indians "purchase[d] a commodity for personal consumption or living quarters for personal use," (421 U.S. 837, 858) for the minutes of the trust committee recited that "very few lived in the Roosevelt area and that many lived outside the State of Utah," and that "[i]t was evident that there was little chance that any of these could make personal use of the grazing rights . . ."[19] Substantially all of them, moreover, were compelled to sell by the practices alleged, in most cases before a single grazing season had arrived and before the stock was issued. Precisely opposite to the situation in *Forman*, where "purchasers [were] inform[ed] that they will be unable to resell," (421 U.S. 837, 854), it was represented to Congress[20] and stipulated as a fact that these Indians were assured that "individuals can trade their shares" and could "give your interest in your distributive share to get more shares in the cattle and sheep operations."[21]

The trial judge acknowledged these facts (*see* App. B, p. 36) as did the Court of Appeals with its declaration that "[t]he corporations were formed to convert the undivided interests of each mixed-blood *into something which could be easily transferred* and something which could be used as an indicia [sic] of ownership." (App. A, p. 13.) (Emphasis added.) The Court of Appeals nevertheless failed to apply the facts as this Court directed in *Forman*.

These range corporations and the distribution corporation this Court considered in *Affiliated Ute* are precisely

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[19]Exhibit 165, stipulated by the parties.

[20]"[W]e know there are a whole group in Salt Lake and other places that will just want their interest out. . . . .We also know that there are quite a few that have much more cattle than their interest will support. So these people have to arrange to buy out the other people that will want to sell." *Hearings on S. 3532 and H. R. 9398, before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. (1954), p. 43. (Exhibit 2A.)

[21]*See* Minutes of Meetings of the Affiliated Ute Citizens for Dec. 8, 1958, Jan. 12, 1959, Mar. 7, 1959, and Apr. 7, 1959, Exhibit 75; Exhibit 429.

the same when measured by the elements this Court defined in *Forman*. All three were negotiable. Limitations on pledge and hypothecation were the same. They all had precisely the same voting rights. All three appreciated in value. The "common enterprise" element[22] was in fact *less* present in the distribution corporation than with these range corporations.[23] All three have the very same attributes (other than formation under the "nonprofit" provisions of state law) with virtually identical provisions in their charters. In truth, the court below stood this Court's holding on its head, for *Forman* held that the definitional sections of the securities laws may not be given literal effect. The court below nevertheless gave the "non-profit" definition of state corporate law literal effect, and applied it in such a way it overrides federal law.

D. *The Policy of the Federal Securities Laws was Ignored.*

To deny the coverage and reach of the federal securities laws to corporations not fitting the classic pattern, or whose commercial objects are arcane, exempts an important segment of industry from needful regulation mandated by Congress in 1932-34. It also ignores the entire history of legal development surrounding those remedial measures, which have stressed the flexibility of the securities laws. *E.g.*, *Affiliated Ute*. That, in truth, was the teaching of *SEC v. Howey Co.*, 328 U.S. 293 (1946) and its progeny; the teaching of the line of cases defining "fraud" under the federal securities laws, of which *Affiliated Ute* forms an important part, *e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); and the teaching of those recent cases con-

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[22]Discussed in, *e.g.*, SEC v. W. J. Howey Co., 328 U.S. 293 (1946).

[23]That is so because the distribution corporation involved in Affiliated Ute held a mere 27% of the undivided mineral estate, and voting with the Tribe was *proportional* – thus leaving the Tribe in absolute control. *See*, 25 C.F.R. § 178.5.

cerned with the frame of mind of the alleged wrongdoer, *e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Court of Appeals would ignore that history of development and force the definition of a "security" into a formalism this Court has consistently rejected.

III

REVIEW SHOULD BE GRANTED TO CONFIRM TRUST PROTECTIONS PROVIDED TO AMERICAN INDIANS BY AN ACT OF CONGRESS

The lower court's handling of the inter-related trust/Indian law issues threatens the rights of all dependent Native populations, whether in trust status, in experimental programs like termination or in protectorates like the Pacific or Caribbean regions. That effect follows from (1) the assumption that the Termination Act was a mandate from Congress to abandon the historic policy of protection of Indians and their property and (2) the reduction of the question of breach of trust to the "good faith" question.

With full knowledge, common to themselves and to any other thinking observer of the American scene, that commonly-held land-base is *the fundamental ingredient* of the Indian way of life, the Bank implemented the sale of Petitioners' only remaining land for no consideration other than the monetary one; and failed to require a *current* monetary value even at that. Correlatively, every sensitive observer knew that the dollar was the *least* important element to the Indian, but the Bank failed to even consider the unique cultural values its Indian wards attach to land ownership. The language of the termination act, and the trust agreement itself,[24] directed preservation of the mixed-bloods' as-

[24]The trust agreement, Exhibit 98, provided in Article II:

> The trustor hereby declares that it is his purpose in establishing this trust *to give effect to the objective of the Government of the*

sets. Moreover, Congress directed assistance to the mixed-bloods in adjusting to their new status, and conferred rights on them equivalent to non-Indian citizens after termination. All of those protections were effectively nullified.

If rights of Indians can be thus eliminated in a social experiment such as termination, then the same threat will follow *any* effort to devise new policies for Native Americans *anywhere*. Programs for the allotment of Indian lands in severalty, competency laws and proceedings, as well as tribal leasing programs, are among the diverse policies and programs where the precedent of this case poses tragic consequences.

A. *The Conclusion that Congress Abandoned the Protections for Indians and their Property Conflicts with Opinions of this Court and the Court of Claims on the Effect of Termination.*

The Court of Appeals affirmed, without comment, the conclusion of the trial judge that in termination "Congress was pursuing the removal of trust restrictions from the management of Indian property . . . rather than the tightening of restrictions and redoubling of supervision by a trustee, be it government or bank." (App. C, p. 133.) The Court of Appeals thus declined to consider the protection of any rights under Indian law, including the "private treaty" right. The holding reverses the policy towards Indians mandated by the Commerce Clause (*see* U. S. Const.,

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United States to terminate the governmental supervision of the members of the mixed-blood members of the Ute Indian Tribe in a manner which will provide for those beneficiaries seeking and able to take advantage of it, every opportunity for assistance in becoming self-reliant individuals, and which will protect them against the improvident dissipation or loss of their assets. [Followed *by provisions directing* assistance in acquiring "real property for farm or business."] (Emphasis added.)

art. I, § 8, cl. 3) and having its origin in Article III of the Northwest Ordinance of 1787 [reenacted at 1 Stat. 51 (1789)]. While Congress may have that power, the courts err when they *imply* such a purpose.

The holding that Congress *reduced* the Indians' rights to protections in the termination laws conflicts, moreover, with numerous recent decisions of the Court of Claims, which has become the most important forum for the adjustment of Indian rights. The Court of Claims has recently held, in a related context, that "once having . . . assumed the task of terminating the [Creek] Nation's mode of life including its manner of holding its lands . . . it was incumbent upon the United States to take every conceivable precaution to insure that the Creek Nation did not suffer the loss of any of its lands." *Yanktown Sioux Tribe v. United States*, 623 F 2d 159, 164 (Ct. Cl. 1980). When the Indians of the Northwest claimed that termination amounted to an implied taking of their lands, the Court of Claims held that "the Congressional history indicates otherwise."

> It shows that Congress was concerned with and aware of all of the Indians' interests and rights, and tried to satisfy them without harm to either the withdrawing or remaining members . . . .

Klamath and Modoc Tribes v. United States, 436 F 2d 1008, 1020-21 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 950 (1971).

B. *The "Private Treaty" Protection Provided by Congress in the Termination Act was Ignored by the Bank, and Changed by Administrative Interpretations of BIA.*

The principal method directed by Congress to assure that, in the words of *Yanktown Sioux*, the mixed-blood group "did not suffer the loss of any of its lands," while they adjusted to a new social/economic status for which everyone knew they were poorly equipped, was the so-called

"private treaty,"[25] (*See* U.S.C. § 677n, *Supra.*, and App. E, p. 149) a simple option for the individual "members" in either group to acquire enough rights to operate a farm or ranch.

Administration of the private treaty by the Bank, in its capacity as trustee and transfer agent, was in fact the principal fiduciary duty contemplated by Justice Blackmun's holding in *Affiliated Ute* at 406 U.S. 128, 152:

> The bank itself had acknowledged, by letter to AUC in January 1958, that "it would be our duty to see that these transfers were properly made" and that, with respect to the sale of shares, "the bank would be acting for the individual stockholders."

Nevertheless, the agreed facts and the findings of the trial judge are that the Bank purposefully acted to nullify Petitioners' private treaty right.[26] The Bank did so because the BIA had decided to alter the meaning of the private treaty so that the Tribe (which was still under BIA protection) could become a purchaser.[27] That necessitated altering the

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[25]The "private treaty" is discussed in some detail in the findings of the trial judge at App. B, pp. 36-42. The regulations originally proposed that "[a]ny mixed-blood member of the tribe desiring to dispose of his interest in any of the lands acquired under the terms of this act to any member of the tribe may do so by private treaty . . . ." (*See* Exhibit 109.)

[26]The findings of the trial judge are at App. C, pp. 84-85:

> . . . it is fairly certain that the Bank knew that the tribe wanted control, had the authorization of the United States to acquire control, and that Interior and B.I.A. interpretations of the Termination Act and the regulations promulgated thereunder cleared the way for the acquisition of control.

[27]The trial judge specifically determined at App. C, pp. 39-40, that

> The tribe was not a "member of the tribe" and thus could not initially purchase range company shares but could purchase only after an offer had been made to individual mixed-bloods and individual full-bloods.

The trial judge further found at App. C, pp. 39-42 that the BIA acted to change the plain meeting of the words used by Congress.

private treaty Congress granted only to individual "members," so that "member" meant "Tribe" and *not* its individual members. BIA resolved to make that change without the knowledge or approval of Congress, by administrative interpretation.

The Bank then acceded to BIA instructions "to proceed with the purchase by the tribe." (App. C, p. 49.) Purchase by the Tribe did not satisfy the purpose of the private treaty, however, which was to enable individual Indians in both groups to assemble an economic unit. To the contrary, it defeated that purpose.

Thoughtful persons of good will may differ in their opinions about the wisdom of BIA's rewriting the private treaty. As the termination policy proved to be a failure, and it became clear that segregating the Utes' property rights would be as destructive as it had been to the Five Civilized Tribes under the allotment policy, it is understandable that BIA wanted to acquire the mixed-bloods' share of the range and restore it to a communal status. The mixed-bloods were no longer the responsibility of BIA, and at that point in time had the Bank to look after their interest.

It was for Congress, however, and not BIA to make the determination to change the private treaty. This Court has been clear that:

> [t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'"

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) quoting from *Dixon v. United States*, 381 U.S. 68, 74 (1965) and *Manhattan General Equipment Co. v. Commissioner*,

297 U.S. 129, 134 (1936). To the same effect, *see Ballinger v. Frost*, 216 U.S. 240, 249 (1910):

> Whenever, in pursuance of the legislation of Congress, rights [of an Indian] have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.

The Court of Claims has held that failure to follow the statutory procedure in the termination of a tribe's rancheria status is a breach of fiduciary duty. *U. S. v. Duncan*, 667 F. 2d 36 (Ct. Cl. 1982), *petition for cert. filed*, 51 U.S. L.W. 3023 (U.S. Mar. 19, 1982). Petitioners' claims that failure to entertain the competing offers, or to preserve the private treaty, amounted to a breach of trust were nevertheless brushed aside by the Court of Appeals with the cryptic observation that "we can see no useful purpose in considering such an offer . . . in view of the rejection of [the Margaret Sprouse' bid] and the reasons for its rejection." (App. A, p. 23.)

In response, we echo this Court's comment in *Arenas v. United States*, 322 U.S. 419, 427 (1944): If the Indians were not to be afforded protections under the Act, and those protections were to be available only to the Tribe, why send government agents to the reservation to hold out that promise? Why the elaborate system of notice, to the individual members, of each proposed sale and of the first refusal option? (*See* App. F, p. 157.) Why the specific provisions concerning terminated Utes "in need of assistance" if Congress had no intention to protect them?

As this Court has said in a related context "[t]he statute's focus on the individual is unambiguous" and "the

question of fairness to various classes affected by the statute [such as the Tribe] is essentially a matter of policy for the legislature to address." *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). As the Court of Appeals for the Ninth Circuit has said:

> In his dealing with the Indians, the Secretary of Interior does not have the power of an asiatic potentate or even of a benevolent despot. He, like his wards themselves, is subject to legislative restrictions.

United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1947), *cert. denied*, 331 U.S. 842. *Cf. United States v. Topco Associates, Inc.*, 405 U.S. 611 (1972); *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982).

The Bank was to have acted in the interest of the mixed-bloods. (406 U.S. 128, 152.) It abandoned that clear fiduciary duty when it cooperated in the elimination of the private treaty for the benefit of the Tribe, which was not a trust beneficiary.

C. *Presumption of Good Faith, in Lieu of "the punctillio of an honor the most sensitive," Denies the Protections of Trust Law to Petitioners and Their Property and Does So Because They are Indians.*

The Court of Appeals responded to Petitioners' objection that there was no evidence to support the conclusion that $1,100 per unit represented the fair value of their respective interest in the range by holding, that "[t]he trial court found that the Bank did not act *imprudently* in utilizing the Moore appraisal." (App. A, p. 2.) (Emphasis added.)

The effect was to substitute the ordinary requirement of *evidence* of *value* for a test in which the fiduciary is excused if it acted in "good faith." The "good faith" test, moreover, was applied as a presumption, for no evidence

was taken at trial or cited by the Court of Appeals supporting the conclusion.

The trial court directly responded to Petitioners' objections in a written opinion declaring that if the United States had executed similar sales, "the appropriate inquiry [would be] whether the government had made 'a good faith effort to give the Indians full value of their lands' " (App. D, p. 132.) "[E]ven under the standards made applicable to the United States," the trial judge continued, "the disputed transactions were [not] beyond the lawful exercise of the bank's powers," *Id.* pp. 132-133, citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) and *United States v. Sioux Nation*, 448 U.S. 371, 416 (1980).

The holding is clear error and a destruction of trust protections available to American Indians, as follows:

1. The holding is a misapplication of *Lone Wolf*, having the effect of extending elements of sovereign immunity to an ordinary commercial trustee if the trust beneficiaries are Indians. Justice Blackmun was clear in *Sioux Nation* that the "good faith" standard applied only because of the implications of sovereign immunity.[28] When Mr. Justice White wrote in *Lone Wolf that* "[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians, and that the legislative branch of the government exercised its best judgment in the premises," he did not do so because the petitioners were Indians, as the courts below assumed — but because the United States was sovereign and the question was a "political" one for Congress. There is no reason to believe that when Congress directed

[28]Justice Blackman explained that the views of the Court in Lone Wolf were based, in part, on a holding that "Congress possessed full power in the matter," • • • [but] "where Congress waives the Government's sovereign immunity . . . there would be far less reason to apply Lone Wolf's principles of deference." 448 U.S. 371, 412-14.

the establishment of trusts it intended the trustee to have the powers of sovereign.

2. The substitution of a "good faith" standard, merely because Petitioners are Indians, denies them the protection of the law of trusts. The classic standard of care for commercial trustees is that announced by Justice Cardozo, of "[n]ot honesty alone, but the punctillio of an honor the most sensitive." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928). This Court has consistently applied that standard. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). *See also, Herman & MacLean v. Huddleston*, ___ U.S. ___, 51 U.S.L.W. 4099 (1983) and *United States v. Nattalin*, 441 U.S. 768 (1979).

The "good faith" standard applied by the Court of Appeals is, moreover, a misstatement of the standard even in cases involving the United States as trustee, where the question of immunity is not an issue. In that event, "all sales must 'be based upon a consideration of the needs and the best interests of the Indian owner and his heirs'" and they are entitled to "the greatest appropriate revenue which should have been obtained." *U. S. v. Mitchell*, 664 F. 2d 265, 271 (Ct. Cl. 1982) *cert. granted*, 50 U.S.L.W. 3963 (U.S. Jun. 7, 1982). The precise standard of "reasonableness" applied by the Court of Appeals herein has been rejected in that context:

> Defendant's theory is that . . its actions were reasonable, and not a breach of trust. . . . that theory must fail . . . the standard of duty for the United States is not mere "reasonableness," but the highest of fiduciary standards.

U. S. v. Duncan, 667 F. 2d 36 (Ct. Cl. 1982), *petition for cert. filed*. 51 U.S.L.W. 3023 (U.S. Mar. 19, 1982). "[A] showing that the value realized from the trust property was so far below its fair market value as to constitute

fraudulent conduct, gross negligence, or other breach of fiduciary duty will suffice without more to establish the trustee's liability" *Coast Indian Community v. United States*, 500 F. 2d 639, 653 (Ct. Cl. 1977).

• • • •

Lone Wolf and *Sioux Nation* simply have no relevance to the inquiry. Application of those cases herein has the effect of imposing new and different trust standards where the trust beneficiary is an Indian and extending the powers of sovereign immunity to an ordinary commercial fiduciary established for Native Americans. Nothing in the termination law would even suggest such a result, and it is a firmly established doctrine that elimination of the protective provisions of Indian law may not be lightly inferred. *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and cases collected there. It is irreconcilable, as well, with the historic, Constitutional, policy of this Nation towards Indians dating from the Northwest Ordinance of 1787.

D. *A Presumption of Value Violates Fundamental Due Process.*

The lower court's handling of the interrelated questions of breach of trust and value has the further effect of denying these Indians the fundamentals of due process, for these Indians must accept a *presumption* — and a presumption not even of *value*, but of "good faith." That presumption, moreover, was based upon outdated appraisals, prepared for vastly different purposes, which are not even in evidence.

Yet, with the uncontroverted testimony before it, stipulated as to its qualifications, establishing a value in excess of 400% of the amount Petitioners were paid,[29] the court below declined to address the problem.

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[29]See note 10, *Supra*.

CONCLUSION

Because of the Court of Appeals decided no issues other than that the Bank had no "duty" under Rule 10b-5, and that there was *no* "fiduciary relationship" between the mixed-bloods and the Bank, *both* of which were decided otherwise by this Court in *Affiliated Ute*, the decision of the Court of Appeals should be summarily reversed.

In the alternative, this case should be remanded to the trial court, with or without hearing, for further proceedings consistent with *Affiliated Ute*.

Any other result threatens the integrity of the judicial system.

Respectfully submitted,

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